Supreme Court, U.S.
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No. 94-1567

In The

Supreme Court of the United States

October Term, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

YAKIMA NATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Indian tribe that is not a party to any treaty and which is a confederation of eleven different tribes, bands and groups, is entitled to exercise off-reservation fishing rights reserved by two other Indian tribes in treaties with the United States because some members of those treaty tribes became members of the non-treaty tribe?

2. Whether the Courts below properly concluded that the issue before them was not the same as the issues before the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians*, 204 Ct. Cl. 868 (1974)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENTS AS TO WHY THE COURT SHOULD DENY CERTIORARI 4

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985) 6

Casillos v. U.S. Navy, 735 F.2d 338 (9th Cir. 1984) 6

Commissioners v. Sunnen, 33 U.S. 147, 92 L.Ed. 898 (1947) 10

Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation, 204 Ct. Cl. 868 (1974) 1, 7, 8, 9

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210 (1979) 11

Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66, 102 S. Ct. 1781 (1982) 6

Samish Tribe v. United States, 6 Ind. Cl. Comm. 159 (1958) 7

Sea Land Services v. Goudet, 414 U.S. 573, 39 L.Ed.2d 883 (1947) 10

Seufert v. U.S., 249 U.S. 194 (1918) 14

Snoqualamie Tribe v. United States, 372 F.2d 951 (Ct. Cl. 1967) 7, 8

Tulee v. Washington, 315 U.S. 682 (1942) 14

U.S. v. Suguamish Tribes, 901 F.2d 772 (9th Cir. 1990) 5

U.S. v. Washington, 384 F. Supp. 312 (E.D. Wash. 1974) 13

U.S. v. Washington, 520 F.2d 676 (9th Cir. 1975) 5, 14

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982) 4, 6, 8

U.S. v. Winans, 198 U.S. 371 (1905) 14

United States v. Oregon, 302 F. Supp. 899 (D.Or. 1968) 13

Washington v. Washington State Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) 14

Whitefoot v. United States, 155 Ct. Cl. 127, 293 F.2d 658 (1961) 11

STATEMENT OF THE CASE

The Yakima Nation adopts the statement of the case as set forth in the joint Nez Perce and Warm Springs opposition to Colville's Petition as to the general factual background of the *U.S. v. Oregon* case, and the historical background of this case. Yakima also adopts the arguments made therein as though fully set forth here.

It is necessary, however, to reiterate that Colville, beginning with the untitled statement found at pages 1 and 2 of Its Petition, and continuing throughout Its statement of the case and argument, mischaracterizes both the factual basis for its claim and the holdings of the Courts below and the Court of Claims case (*Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974)) upon which It relies for Its estoppel claim. Those mischaracterizations are as follows:

(1) The issue in this case was whether any groups of Indians on the Colville Reservation had retained "Treaty Tribes status" at the time of the Colville Confederation. Both the District Court and the Ninth Circuit held, as a factual matter, that Colville had failed in its burden of proof on this issue. Colville's continued reference to "Treaty Tribes" on its Reservation as though that fact had been established in Colville's favor, is incorrect and unfairly mischaracterizes the posture of this case;

(2) As is discussed *infra* in the argument section, the issue before the Court of Claims in *Colville v. Yakima*, 204 Ct. Cl. 868 (1974) was the division of claims funds for a *divestiture of aboriginal land claims through a treaty land*

cession, not a determination of the retention of prospective Treaty rights. The District Court, the Ninth Circuit, and the Court of Claims all recognized that the Claims Court decision did not deal with the issue of Treaty right status in any manner. Again, Colville's statements that the Court of Claims in any way ruled on Colville's "Treaty right status" is an unfair and incorrect statement of both the Claims Court ruling and the holdings of the Courts below.

Also, the District Court action regarding Yakima is somewhat different from that involving Nez Perce. Colville and Nez Perce submitted agreed facts and no other evidence. Yakima and Colville, on the other hand, submitted some agreed facts, but also presented the written testimony (over 200 pages) of four expert witnesses and the testimony of eight lay witnesses. The evidence was in dispute and the District Court made findings of fact on that disputed evidence. Colville's inclusion of Appendix 2, as "Yakima agreed facts", should not confuse the Court that those were the only facts before the Court. Based upon the evidence before it, the District Court, as to both the Yakima and Nez Perce claims, determined that Colville had failed in its burden of proof as to "Treaty Tribe status".

The Court should also note that the executive order creating the Colville Reservation, Colville Appendix G, P. 86a, created a reservation for Indians "not parties to any treaties". Similarly, the 1883 executive order under which "Moses and his people" (the group from whom Colville claims Yakima Treaty rights), makes no reference to a treaty and provided only that:

> The Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, *equal rights and protection alike with all other Indians now on the Colville Reservation,* and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people.
>
> Appendix C hereto, P. 23.

Finally, as is further discussed *infra*, contrary to Colville's assertion, both the District Court and the Ninth Circuit properly dealt with Colville's claim of estoppel as to their alleged "Treaty Tribe status". Colville moved for summary judgment on this issue, filing a 30 page brief, including 38 exhibits. The District Court heard oral argument and ruled on Colville's motion:

> As to the issue of whether the five aboriginal tribes moved to the Colville Reservation and whether the Colville presently represent these tribes in all tribal or group matters, *I find that the combined findings of the ICC and Court of Claims as to the movement of significant numbers of the tribal members to the Colville Reservation, the "group nature" of the damage claim and the Colville's status as the current "tribal representative" of the tribes for the purpose of allocating the damage award do not support the Colville's contention that the claims decisions found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved as tribes onto the Colville Reservation and are currently represented in all tribal matters by the Colville. Thus, the doctrine of collateral estoppel does not preclude litigation of*

this matter.[1] District Court opinion pages 11 and 12, opinion and order contained herein as Appendix 1.

The Circuit affirmed this decision by finding that Judge Marsh made a proper *factual* determination in deciding that Colville had failed in Its proof of "Treaty Tribe status" at the time that Moses and his people moved to Colville. Obviously the Ninth Circuit Court of Appeals, in upholding Judge Marsh's opinion, understood the thrust of its precedents in this area of the law.

ARGUMENTS AS TO WHY THE COURT SHOULD DENY CERTIORARI

1. This case is of no nationwide importance, no significant precedential value nor will it provide instruction to the lower Courts.

Yakima adopts the arguments on these issues made in the joint reply brief in opposition filed by the Nez Perce and Warm Springs Tribes.

2. This Court has previously denied certiorari on the Ninth Circuit's law on the issue in this case.

As the Nez Perce and Warm Springs indicate in their Petition, this Court has previously denied certiorari in a case dealing with this issue. *U.S. v. Washington,* 641 F.2d

[1] The District Court did determine, based on the Claims Court findings and conclusions, that several factual issues had been decided and precluded the parties from relitigating these issues. Order on Summary Judgment Appendix A hereto P. 13.

1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982). Colville presents no theory or compelling reason why, after thirteen (13) years of additional development of Ninth Circuit law on this issue – see *U.S. v. Suguamish Tribes*, 901 F.2d 772 (9th Cir. 1990) – this Court should change its policy. Yakima submits that there is no basis for a change, and this petition should be denied.

3. The District Court's ruling was a factual determination supported by substantial evidence and was properly upheld by the Ninth Circuit.

As the District Court's opinion on summary judgment (Appendix A hereto) reflects, the issue of whether any of the descendants of Yakima and Nez Perce Treaty Tribes moved to the Colville Reservation *as Tribes*, retaining any Treaty rights, are questions of fact. (Appendix A P. 12) The clearly established law of the Circuit on this issue is found in *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975):

> Reviewing Judge Boldt's initial decision, we indicated that treaty-tribe status is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." 520 F.2d at 693. ***Whether these conditions are met is a factual question which a district court is competent to determine*** at 693 Emphasis added.

Judge Marsh determined, as a factual matter, that under the established law of the Circuit, Colville had failed to meet its burden to qualify for Tribal identity.

That decision could only be upset on review if it was clearly erroneous:

> *"The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the [Title VII] plaintiff." . . . We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes. Casillos v. U.S. Navy,* 735 F.2d 338, 342 (9th Cir. 1984)

Of course, the Circuit's rule on factual findings is in accord with Federal Rule 52(a) and the decisions of this Court. *Anderson v. Bessemer City,* 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273, 72 L.Ed.2d 66, 102 S. Ct. 1781 (1982).

The Circuit's amended opinion, found in Colville Appendix A, at page 14a, indicates Its treatment of this case as a review of the Trial Court's factual findings:

> Failure to move onto the reservation is not the determinative factor in deciding whether a group has retained treaty rights. *Rather, it is only one consideration relevant to an essentially factual inquiry* – i.e., whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe. See *Washington II,* 641 F.2d at 1372-73. (Emphasis added)

The Circuit considered Judge Marsh's findings, found sufficient support for them to pass the clearly erroneous test, and affirmed his decision. See discussion of Judge Marsh's factual determinations at page 10a of Colville's Appendix A. Further review will serve no purpose.

4. The decision of the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974) created no grounds for estoppel as to the ultimate issue in this case.

A. The established law of the Ninth Circuit, in a case in which this Court has already denied certiorari, is contrary to Colville's claims of estoppel.

As noted previously, this Court denied certiorari in the case of *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1988), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982). The issue there was the test for "Treaty Tribes recognition" for exercise of fishing rights under a Stevens Treaty. The Snoqualmie Tribe, which had previously presented a successful Court of Claims action for the loss of its aboriginal lands, asserted that that ruling established its "Tribal status" for Treaty fishing rights purposes.

In spite of a specific finding by the Court of Claims that the Snoqualmie was a "fishing and hunting" tribe for purposes of that claim, the Ninth Circuit refused to find that ruling estopped the United States in a subsequent action to establish tribal treaty fishing rights:

> The appellants contend that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members. *Snoqualmie Tribe v. United States*, 372 F.2d 951, 957-58 (Ct. Cl. 1967); *Samish Tribe v. United States*, 6 Ind. Cl. Comm. 159 (1958).

> **These claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable.** 1B Moore's Federal Practice 0.405[1], [3]. (emphasis added) *United States v. Washington,* 641 F.2d at 1374.

The claims cases discussed herein are identical to those brought by *Snoqualmie.* They were claims for damages for underpayment for the cession of lands under a Stevens Treaty. Counsel for those petitioners is also counsel for Colville in this case.

Colville now asks the Court to grant certiorari on precisely the same issue which this Court chose to deny certiorari in 1982. The holding in *U.S. v. Washington, supra,* is the established law of the Circuit, and it was followed by both Courts below. This Court should not now change the decision it made in the denial of certiorari in 1982.

B. The holdings in *Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation,* 204 Ct. Cl. 868 (1974), and the Indian Claims Commission before it, are specifically limited by their language to the issue of division of the Judgment owed, and not the rights of Colville under the Yakima Treaty.

Colville, throughout this case, mistakenly alleges the claims cases established its "status" with regard to the Yakima Treaty and determined its "rights" under the Yakima Treaty. (Colville Petition, pages 11-12) That did not happen. The only issue before those Courts were the division of the Indian Claims Commission Docket 161 monetary award, not any continuing "rights" under the

Yakima Treaty or the "status" of Colville as a "treaty" tribe. The initial trial in Indian Claims Commission Docket 161 was for the purpose of determining:

> (1) whether the petitioners, or any of them, have authority, under the Indian Claims Commission Act, to present claims for the taking of the area described in paragraph 8 of the petition in Docket No. 244, as amended;
>
> (2) whether the petitioners, or any of them, held Indian title to the said area, or any part thereof;
>
> (3) the date of the taking, if any, of the said area, or any part thereof by the defendants.
>
> 7 Indian Claims Commission 794, 795.

Following that hearing, the Indian Claims Commission in Docket 161, determined that both the Yakima and Colville were entitled to share in some portion of the funds found to be owing. Thereafter, Court of Claims Commissioner Harkins, whose opinion was adopted as the opinion of the Court of Claims, in 204 Ct. Cl. 868, at 869, specifically found that:

> **Validity of the Yakima Treaty is not an issue in this case, and the legal consequences of the treaty are irrelevant to the division of the monetary award . . .**
>
> **The Yakima Treaty provides a conduit for extinguishment of the Indian title rights of the 11 tribes** and it created an entity to accept compensation for the taking of the aboriginal lands. **Interpretation of the scope and content of its various provisions are not the subject of this case. In the past, application of the treaty provisions to particular questions have arisen and**

> **have been resolved. In the future, interpretation of the treaty provisions may *be determined in the context of the factual circumstances that apply when such issues arise*.** (footnotes omitted) (emphasis added)

Report of Claims Court Commissioner Harkins. Pages 7 and 8 included here as Appendix B.

The holdings upon which Colville relies to establish its "rights" and "status" through collateral estoppel, are specifically limited by their terms to the division of the monetary award for lands taken by the United States pursuant to the Yakima Treaty.

The Court of Claims further specifically noted that future controversies involving the Yakima Nation and the "scope and content" of the Treaty must be resolved in the factual contexts in which they arise. It could not be more clear that the Court of Claims limited its decision to the monetary award. It did not deal with the issues Judge Marsh found to be preserved for trial – the issue of retention of Treaty rights. Marsh Summary Judgment Opinion Appendix A P. 12.

Colville, at trial, before the Ninth Circuit and now before this Court, simply insists that the Court of Claims' decision determined all issues as to its alleged Treaty status. The Court not only did not make such a decision, it specifically rejected any suggestions that it do so, leaving such decisions to later decisions. Without proof that an issue identical to this one was before the Claims Court and actually decided, Colville's estoppel argument must fail. *Sea Land Services v. Goudet*, 414 U.S. 573, 39 L.Ed.2d 883 (1974); *Commissioners v. Sunnen*, 33 U.S. 591, 601, 92

L.Ed. 898 (1947); *Montana v. United States*, 440 U.S. 147, 153, 59 L.Ed.2d 210 (1979).

Judge Marsh properly found, and the Circuit confirmed, that the issue of treaty rights for fishing purposes was not one decided by the Claims Court, and was, therefore, a proper basis for a trial on the factual issues. This decision is correct. There is nothing novel or compelling about it which warrants review by this Court.

C. The Claims Court specifically determined that the Yakima Tribe was the holder of Treaty rights under the Treaty with the Yakimas.

Colville asserts that the Court of Claims found that Yakima "did not exist", apparently contending that Yakima Treaty rights are somewhere in limbo. This again is incorrect. The Claims Court, in previous cases, cited with approval by Commissioner Harkins in his opinion (Appendix B, P. 19, footnote 3), specifically held the Yakima Tribe was the owner of the Yakima Treaty fishing right.

In *Whitefoot v. United States*, 155 Ct. Cl. 127, 293 F.2d 658 (1961), cited by Commissioner Harkins at footnote 3, the Court of Claims determined that the fishing rights secured under the Yakima Treaty of 1855 were held by the Confederated Tribes and Bands of the Yakima Indian Nation rather than by Mr. Ambrose Whitefoot, a member of the Yakima Indian Nation who was claiming rights through membership in one of its aboriginal bands. Accordingly the Court held that Mr. Whitefoot had no individual claim against the United States:

> While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian Law, supra, 757. As to fishing, this is true. **But, like the lands, the interests in the fisheries are communal, subject to regulations.**
>
> [1.2] **We hold that the use of accustomed fishing places whether on or off the reservation, is a tribal right for adjustment** by the Tribe and that the fact that certain Indians have been allowed to have sole use of a particular spot by the Tribe gives that individual no property right against the Tribe and does not limit the Tribe's right to collect the damages for obliteration of fishing spots by the dam. We hold further that Minnie Whitefoot has no claim against the United States. (emphasis added) at 663.

Obviously the Court of Claims recognized that the Yakima Nation held the fishing rights reserved under the Treaty of 1855. Colville's assertions to the contrary are unsupported by the cases they cite. Nothing in their argument warrants review by this Court.

D. The law is clearly established as the law of this case, the Ninth Circuit, and this Court that the current Yakima Nation is the Treaty Tribe holding off reservation fishing rights under the Treaty of 1855.

As Yakima argued before both the Trial and Appellate Courts, it is not Its status which is at question here. Instead it is whether Colville has any basis to also exercise rights under the Yakima Treaty. The status of Yakima is irrelevant. However, Colville continues to troll that red

herring in hopes of a bite. Yakima believes a brief description of its Federally recognized rights will be of assistance to the Court.

The District Court in this case, in 1968, found that the Yakima Nation was the proper party to regulate fishing rights under the Yakima Treaty. Judge Belloni's original ruling, not appealed by any party, reflects the Court's decision on the proper treaty parties:

> Shortly thereafter the *United States on its own behalf and on behalf of the Confederated Tribes and Bands of the Yakima Reservation, the Confederated Tribes and Bands of the Umatilla Reservation composed of the Walla Walla, Cayuse and Umatilla Bands of Tribes, the Nez Perce Indian Tribe and "all other tribes similarly situated" filed Case No. 68-513* . . . Following the intervention of the Warm Springs Tribe and *upon the inability of government counsel to identify any other tribes who were "similarly situated", the State's motion to strike the reference to such other tribes was granted.* (emphasis added.)

United States v. Oregon, 302 F. Supp. 899, 904 (D.Or. 1968).

The District Court recognized that it had *all parties* to these rights before it when it stated:

> *Today, some 114 years later, all of the parties to those treaties are in essential agreement as to their meaning* and they have joined in asking this Court to confirm that construction (*Id.* at 905).

Likewise Judge Boldt, in *U.S. v. Washington*, 384 F. Supp. 312 (E.D. Wash. 1974) at page 406 held:

> Each of the plaintiff tribes listed below is a "Treaty Tribe".

> A Treaty Tribe occupies the status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others:
>
> Confederated Tribes and Bands of the Yakima Indian Nation.[2]

This decision was affirmed by the Ninth Circuit in *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975), and affirmed by the Supreme Court in *Washington v. Washington State Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L.Ed.2d 823, 99 S. Ct. 3055 (1979). See also *U.S. v. Winans*, 198 U.S. 371 (1905), *Seufert v. U.S.*, 249 U.S. 194 (1918) and *Tulee v. Washington*, 315 U.S. 682 (1942).

Yakima's rights are the law of this case and the law of this land. Colville's contrary arguments are simply incorrect.

CONCLUSION

Colville petitions for certiorari asserting the precedential importance of this case, claiming a conflict exists between this case and *Washington v. Washington State Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979). As this

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[2] Judge Boldt also made the following finding, at P. 380:
The Yakima Nation is a party to treaty with the Yakimas. [Ex. Y-6] *It is recognized by the United States as a currently functioning Indian tribe composed of the tribes and bands consolidated into the Yakima Nation by that treaty and maintaining a tribal government on the Yakima Reservation*, located in South Central Washington. (emphasis added)

brief is in opposition and the brief in opposition filed by the Nez Perce and Warm Springs Tribes reflect, there is no national or precedential value to this case, and no conflict exists with any decision of this Court. Both courts below dealt properly with the issues before them. Accordingly this Court should deny the Colville Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF OREGON, et al., Defendants, and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff-Intervenor.	Civ. No. 68-513-MA OPINION (Filed Feb. 25, 1991)

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MARSH, Judge.

Plaintiff-intervenor Confederated Tribes of the Colville Reservations ("Colville") move for partial summary seeking a ruling from this court that all parties to this action are collaterally estopped from relitigating issues which were litigated and resolved in proceedings before the Indian Claims Commission ("ICC"), reported at 7 Ind. Cl. Comm. 794 (1959), 12 Ind. Cl. Comm. 301 (1963) and 15 Ind. Cl. Comm. 196 (1965), and before the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of the Yakima Reservation*, (Docket 261-70), 204 Ct. Cl. 868 (April 24, 1974) (collectively referred to as the "claims decisions"). The Colville contend that these decisions determined both the Colville's relationship to the Chelan, Wenatchi, Entiat, Columbia and Palus tribes, aboriginal tribes who were party to the Yakima Treaty of June 9, 1855, 12 Stat. 951, and the nature and purpose of the "Yakima Nation" described in the preamble to this Treaty. The Colville claim that the doctrine of collateral estoppel properly applies to these judicial determinations because although this case involves fishing rights under the 1855 Treaty and the claims decisions involved the right to be paid fair compensation for lands taken under the Treaty, both cases involve the same Treaty and the same background issues as to the movement of the signatory tribes and the meaning of "Yakima Nation" in the Treaty. The Colville do not contend that the claims decisions determined whether the Colville have treaty fishing rights as a successor-in-interest to the five aboriginal tribes but rather argue that the application of collateral estoppel to background matters is important to the resolution of the fishing rights issue because it will

substantially simplify the trial on this matter. For the reasons set forth below, the Colville's motion is granted in part and denied in part.

STANDARDS

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotext Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1983); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party. *Hector v. Wiens*, 533 F. 2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment is inappropriate. *Sankovitch v. Insurance Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

DISCUSSION

The doctrine of collateral estoppel precludes the relitigation of an issue of fact or right once decided by a court of competent jurisdiction. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987). Under this doctrine, once an issue is

actually and necessarily determined "that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana*, 440 U.S. at 153. Collateral estoppel is used "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153. In order for collateral estoppel to apply, it must be shown that the issue was (1) actually litigated between the parties in a former proceeding and (2) necessary to both proceedings. *Starker v. United States*, 602 F.2d 1341, 1344 (9th Cir. 1979). In determining whether the issue was actually litigated between the parties in the former proceeding, the Supreme Court has set forth the following three part test:

> first, whether the issues presented by [the present] litigation are in substance the same as those resolved . . . [in the prior litigation] . . . , second, whether controlling facts or legal principles have changed significantly since the [prior judgment]; and finally, whether other special circumstances warrant an exception of the normal rules of preclusion.

Montana, 440 U.S. at 155. Collateral estoppel applies to the decisions of administrative tribunals as well as courts, *Huettig & Schrom, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426 (9th Cir. 1986), and has been applied to bar the relitigation of issues previously decided in ICC and Court of Claims proceedings, *Yankton Sioux Tribe v. Nelson*, 604 F.Supp. 1146 (D.S.D. 1985), *rev'd on other grounds*, 796 F.2d 241 (8th Cir. 1986). Collateral estoppel has been applied in litigation involving Indian tribes on issues of tribal identity, *Mashpee Tribe v. Watt*, 707 F.2d 23, 24 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983), water

rights, *Arizona v. California*, 460 U.S. 605, 616 (1983), and wrongful termination matters, *Duncan v. United States*, 667 F.2d 36, 38 (Ct. Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983).

The background to and actual holding of the ICC and Court of Claims' decisions allocating the damage award between the Colville and Yakima Tribes is largely undisputed. In 1948, the Yakima Tribe filed a petition before the ICC claiming that it had not been paid fair compensation for lands ceded under the Treaty of 1855. In that petition, the Yakima Tribe claimed that it was the representative of and successor to each of the tribes which had been party to the 1855 Treaty and was therefore entitled to a damage award on their behalf. The Colville Tribes also filed petitions before the ICC claiming that it represented the interests of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes and that the Colville, not the Yakima, were therefore entitled to the damage award for undercompensated lands on behalf of these tribes.

In determining how the damage award should be allocated, the ICC found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes were parties to the Treaty of 1855, 7 Ind. Cl. Comm. at 800-01, and that the Colville represented their interests for the purpose of allocating a monetary damage award. In so doing, the ICC made the following determinations: (1) the Yakima Tribe was "not synonymous with nor the successor to the Yakima Nation which was created in 1855 and was . . . wronged by the treaty of 1855," (2) the "Yakima Nation which was created in 1855 does not exist as an entity today," (3) "a significant number of Indians who were members of various of the fourteen tribes or groups

comprising the Yakima Nation became located on the Colville Reservation. Indians from the Chelan, Entiat, Wenatchi, Columbia and Palus tribes in particular became located in large numbers on the Colville Reservation," 12 Ind. Cl. Comm. at 368, and (4) "[t]here was no movement as a tribe by either the Chelan, Entiat, Wenatchi or Columbia on to the Yakima reservation although individual members of each of the four tribes did move to that reservation." 7 Ind. Cl. Comm. at 802. While the ICC found that "Chief Moses and his followers did, in fact, move onto the Colville Reservation and the members of his band or the descendants thereof have continued to reside on that reservation until the present date," 7 Ind. Cl. Comm at 811, *accord* 12 Ind. Cl. Comm. at 368, it did not specifically find that the Chelan, Wenatchi, Entiat, Columbia, and Palus tribes moved to the Colville Reservation as tribes. The Court of Claims did, however, find that:

> Combining the trial judge's findings . . . with the Commission's findings[1] . . . we conclude that

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[1] On this issue, the Commissioner found that "[i]n this case, the tribal entities can be traced to plaintiff Colville Tribes and to defendant Yakima Tribes." The Commissioner therefore concluded that "justice and fairness require the judgment funds to be divided on the basis of acreage contributed by the respective tribes that were confederated into the Yakima Nation. Such a division accords with the concept that compensation for taking tribal land is a tribal claim and not an individual claim." Addressing this issue, the Commissioner concluded that "[d]efendant [Yakima tribe] represents the interest of the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes" and that "[p]laintiff [Colville Tribe] represents the interests of the Chelan, Entiat, Wenatchi, Columbia and Palus Tribes."

> it is clear that plaintiff [Colville Tribes], not defendant [Yakima Tribe], represents the interests of those particular groups [the Chelan, Wenatchi, Entiat, Columbia and Palus tribes]. Although defendant may have some members who are descendants of the same original groups, the claim is a group claim and the present tribal representative, if there is one, normally obtains the award . . . Justice and fairness do not require us to disregard the group nature of the claim, and the status of plaintiff as the current tribal representative of the five named groups, so as to increase defendant's award because its membership happens to include a number of descendants of Indians who belonged to the groups now represented by the plaintiff.

204 Ct. Cl. at 870.

Based on the findings by the ICC and the Court of Claims, the total damage award for undercompensated lands was allocated between the Colville and Yakima Tribes with the Colville Tribes receiving all of the award attributable to lands owned by the Chelan, Wenatchi, Entiat, Columbia and Palus tribes. The Court of Claims so awarded the damages based on its finding that the damage claim was of a "group nature" and that the Colville tribe was "the current tribal representative of the five named groups." 204 Ct. Cl. at 870.

Reports of the Commissioner to the Court, Docket No. 261-70 (July 27, 1973).

The Colville argue that the allocation of the damage award on behalf of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes to the Colville based on the "group nature" of the claim constitutes a finding that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved to the Colville Reservation as tribes and are now represented by the Colville. As explained below, I disagree with this conclusion.

The Yakima oppose Colville's motion for partial summary judgment and emphasize the numerous issues which must be addressed and resolved by this court before the Colville can be found to be entitled to fishing rights under the 1855 Treaty. In particular, the Yakima argue that in order to show entitlement to treaty fishing rights the Chelan, Wenatchi, Entiat, Columbia and Palus tribes must prove (1) that these tribes moved as tribes to the Colville Reservation, (2) that they have enjoyed a continuous cultural and political existence once relocated on the Colville Reservation and have not been assimilated by other non-treaty groups, *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), and (3) with respect to the entitlement of the Confederated Tribes of the Colville Reservation themselves, that they have acquired "treaty tribe status" through their consolidation or merger with treaty tribes and the maintenance of an organized tribal structure, *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990). The Yakima contend that the claims decisions did not determine these essential matters because the claims decisions dealt only with the compensation of tribal descendants for the extinguishment of aboriginal

land claims by the Treaty of 1855 and not with the establishment or continuation of any aboriginal claims or rights under the treaty.[2]

The United States, Oregon, Washington and Idaho, and the Umatilla, Nez Perce and Warm Springs Tribes have all agreed that while not technically estopped by the claims decisions because they were not parties to that litigation, they will not seek to relitigate at the trial on the Colville's treaty fishing rights purely factual matters raised in the Colville's motion for partial summary judgment. The parties reserve their right, however, to raise questions of law and questions of mixed law and fact concerning the legal significance of the claims decisions' factual determinations.

With the exception of the issue of whether the aboriginal tribes moved as tribes onto the Colville Reservation, I find that the issues raised by the Yakima in opposition to the Colville's motion for partial summary judgment are not matters on which the Colville are moving for summary judgment. While these unresolved matters as to the assimilation, consolidation and/or merger of the aboriginal tribes with other tribes located on the Colville Reservation must ultimately be resolved in order to determine

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[2] In their memorandum in opposition to the Colville's motion for partial summary judgment, the Yakima go even farther and argue that in another claims decision, the "ICC found that the 'Colville Tribe' had no treaty reserved fishing rights that are the subject matter of *United States v. Oregon*, 302 F.Supp. 899." I disagree with this interpretation of the ICC's decision. The ICC merely recognized that "the existence of special fishing rights is a question of fact" which was not before the Commission. 36 Ind. Cl. Comm. 183, 193-94 (1975).

prospective fishing rights, the Colville do not seek to have the doctrine of collateral estoppel applied to these matters. Accordingly, collateral estoppel does not apply.

As to the issue of whether the five aboriginal tribes moved to the Colville Reservation and whether the Colville presently represent these tribes in all tribal or group matters, I find that the combined findings of the ICC and Court of Claims as to the movement of significant numbers of the tribal members to the Colville Reservation, the "group nature" of the damage claim and the Colville's status as the current "tribal representative" of the tribes for the purpose of allocating the damage award do not support the Colville's contention that the claims decisions found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved as tribes onto the Colville Reservation and are currently represented in all tribal matters by the Colville. Thus, the doctrine of collateral estoppel does not preclude litigation of this matter.

With respect to the remaining issues presented in the Colville's motion for partial summary judgment, I find that these issues are "in substance the same" as those resolved in the claims decisions, that the controlling facts and legal principles have not changed significantly since the claims decisions were rendered and that no special circumstances warrant an exception to the normal rule of preclusion. *Montana*, 440 U.S. at 155. Accordingly, collateral estoppel applies to the remaining issues.

CONCLUSION

For the reasons set forth above, the Colville's motion for partial summary judgment is granted in part and

denied in part. The Yakima Tribe are hereby collaterally estopped from relitigating the following determinations made by the ICC and Court of Claims: (1) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes were each party to the Yakima Treaty of June 9, 1855 which was entered into at Walla Walla, Washington territory; (2) the "Yakima Nation" which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today; (3) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes and the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes are successors to the "Yakima Nation" identified in the preamble to the 1855 Treaty; (4) there was no movement as a tribe by either the Chelan, Wenatchi, Entiat, Columbia or Palus tribes onto the Yakima Reservation although individual members of the tribes did move to that reservation; (5) a significant number of Indians who were members of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved onto the Colville Reservation; and (6) the Colville Tribes represent the tribal interests of the Chelan, Columbia, Wenatchi, Entiat and Palus Tribes for the purpose of allocating the monetary damage award for undercompensated lands under the Treaty of 1855. The other parties to this action are precluded from relitigating these factual determinations based on their consent to preclusion.

DATED this 25 day of February, 1991.

/s/ Malcolm F Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF OREGON, et al., Defendants, and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff-Intervenor.	Civ. No. 68-513-MA ORDER (Filed Feb. 25, 1991)

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For the reasons set forth in my opinion filed this date, the Colville's motion for partial summary judgment is granted in part and denied in part. The Yakima Tribe are

hereby collaterally estopped from relitigating the following determinations made by the ICC and Court of Claims: (1) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes were each party to the Yakima Treaty of June 9, 1855 which was entered into at Walla Walla, Washington Territory; (2) the "Yakima Nation" which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today; (3) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes and the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes are successors to the "Yakima Nation" identified in the preamble to the 1855 Treaty; (4) there was no movement as a tribe by either the Chelan, Wenatchi, Entiat, Columbia or Palus tribes onto the Yakima Reservation although individual members of the tribes did move to that reservation; (5) a significant number of Indians who were members of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved onto the Colville Reservation; and (6) the Colville Tribes represent the tribal interests of the Chelan, Columbia, Wenatchi, Entiat and Palus Tribes for the purpose of allocating the monetary damage award for undercompensated lands under the Treaty of 1855. The other parties to this action are precluded from relitigating these factual determinations based on their consent to preclusion.

IT IS SO ORDERED.

DATED this 25 day of February, 1991.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

APPENDIX B

. . . . Its purpose was to satisfy the requirements of the territorial acts[8] that prohibited any impairment of the rights of Indians to lands in the territories so long as such rights remained unextinguished by treaties with the United States.

At the Walla Walla Council, the Indians were to be persuaded to agree to cede their tribal territories in exchange for guaranteed use of specified reserved areas, and for certain additional considerations. The policy adopted by [6] the Indian Bureau, and implemented by Governor Stevens and General Palmer, was to deal only with recognized leaders who had great authority among the Indians. Through recognition and appointment of "head chiefs," the numerous groups of tribes or bands were to be united into larger units which would be concentrated on a few reservations.

The Walla Walla Council was protracted and negotiations to obtain agreement with the Indians were difficult. In anticipation of possible hostility, and to assure a successful conclusion, Governor Stevens had arranged for military troops to be present. Some of the tribal leaders were absent, and others refused to participate in council discussions. The chief that Governor Stevens had designated to be head chief of the Yakimas, Chief Kamiakin, on June 8, 1855, prepared to leave the council without signing. In a series of closed meetings, during which extraordinary pressures were applied, including the threat of

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[8] Act of August 14, 1848, 9 Stat. 323; Act of March 2, 1853, 10 Stat. 172.

military action, Governor Stevens ultimately was able to overcome the Indians' reluctance and to obtain signatures to the Yakima Treaty on June 9, 1855, after the council's open session had adjourned.

Plans apparently were made at Walla Walla for the hostilities that broke out immediately after Chief Kamiakin returned from the council. After a 3-year period of intermittent campaigns and raids, the Army commander reported, on September 30, 1858, that the "war is closed" and the [7] Indians "have been entirely subdued." Congress, on March 8, 1859, ratified the treaty.

Validity of the Yakima Treaty is not an issue in this case, and the legal consequences of the treaty are irrelevant to division of the monetary award. The Indians, in fact, signed the treaty and, on ratification by Congress, it became law.[9] Subsequent exercise of dominion over the ceded lands and the history of white settlement since 1855, as well as the continuing recognition of the treaty in dealings with Indians at the Yakima Reservation after its ratification, manifest its effectiveness for its major purposes. Coercion of the representatives of the tribes, or duress prior to its execution, did not prevent the extinguishment of the Indian title to the land ceded by the treaty.[10] The Indian Claims Commission did not deem it necessary to utilize its authority to revise the treaty on the ground of duress.[11] The Commission concluded it

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[9] *United States v. Old Settlers*, 148 U.S. 427 (1893); *Sohappy v. Smith*, 302 F. Supp. 899, 905 (1969).

[10] *See Pillager Bands of Chippewa Indians v. United States*, 192 Ct. Cl. 698, 704, 428 F.2d 1274, 1277 (1970).

[11] 25 U.S.C. § 70a (1970).

could best correct the injustice done to the Indians by awarding additional compensation for the lands that had been taken through the [8] instrument of the treaty.[12]

The Yakima Treaty provides a conduit for extinguishment of the Indian title rights of the 11 tribes and it created an entity to accept compensation for the taking of the aboriginal lands. Interpretation of the scope and content of its various provisions are not the subject of this case. In the past, application of the treaty provisions to particular questions have arisen and have been resolved.[13] In the future, interpretation of the treaty provisions may be determined in the context of the factual circumstances that apply when such issues arise.

Conduct of the parties during pretreaty negotiations at the Walla Walla Council and the treaty provisions relative to the tribal constituency of the "Yakima Nation," bear upon the Indians' rejection of the Yakima Treaty. Ethnological information relative to the customs and living conditions of Indians in the Plateau Culture provides an insight into the reasons the Yakima Reservation was not [9] acceptable to some of the Indians purported to be included in the Yakima Nation. Ethnological data also provide a basis for tracing tribal groups during the post-

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[12] 12 Ind. Cl. Comm. 301, 370.

[13] *See, e.g., White v. United States*, 155 Ct. Cl. 127, 293 F.2d 658 (1961), re fishing rights of individual Indians. The Wenatshapam Fishing Reservation, a 6-mile square area situated at the forks of the Pisquouse and Wenatshapam Rivers in the Wenatchi tribal area, provided in article X of the treaty, was sold to the United States in 1894. The proceeds of this sale were paid to the tribal funds administered by the agency at Fort Simcoe on the Yakima Reservation.

treaty period of dispersal and subsequent relocation on reservations other than the Yakima Reservation.

The Yakima Nation, which came into existence on July 9, 1855, had a life of minimal duration, and it has no present existence. The Yakima Nation was an artificial device contrived to open the largest extent of the territories to settlement as soon as possible. The concept of a Yakima Nation, as established by the treaty, did not take into account linguistic differences or Indian tribal identification with particular geographical locations. The treaty was devised in ignorance of, or in disregard to, the identity, location, and leadership of the affected Indian groups.

The 14 separately named Indian tribes and bands confederated into the Yakima Nation spoke differing dialects from three major language groups: Salish,

APPENDIX C

* * *

AGREEMENT WITH THE COLUMBIA AND COLVILLE, 1883.

In the conference with Chief Moses and Sar-sarp-kin, of the Columbia reservation, and Tonaskat and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte Creek to accommodate one hundred pupils (100), and a physician to reside with them, and $100. (one hundred) to himself each year.

Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen mile strip cut off from the northern portion of the Columbia Reservation, to be allowed to select enough more unoccupied land in Severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile; or to move on to the Colville Reservation, if they so desire, and in case they so remove, and relinquish all their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling-house for himself; also to construct a saw mill and grist-mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claim upon the Government for any land situate elsewhere.

Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, equal rights and protection alike with all other Indians now on the Colville Reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people. That until he and his people are located permanently on the Colville Reservation, his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality

of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected. Or should they move on to the Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

All of the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement; and also, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville Reservation until Congress does make such appropriation, etc.

H.M. TELLER,
Secretary of Interior.
H. PRICE,
Commissioner of Indian Affairs.
MOSES (his x mark),
TONASKET (his x mark),
SAR-SARP-KIN (his x mark).